89-1956

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DONALD WELL, General Partner,
TMG II a New York Limited Partnership,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Was it improper for the U.S. Government to seek to stay private civil litigation by delivering to a U.S. District Court *ex parte in camera* communications with no prior leave of court or notice to opposing counsel.

2. If so, ought that impropriety be weighed as a factor in determining whether the private litigant's judgment against the defendants in the civil suit should be given *nunc pro tunc* priority over federal tax liens against the same defendants.

LIST OF PARTIES

The parties and *amici curiae* to the proceedings below were:

Donald Weil, General Partner, TMG II New York Limited Partnership;

TMG Associates Custodial Committee;

Edward A. Markowitz;

Debra Strahan;

Monetary Services Corporation;

Monetary Group N.V.;

Monetary Group Government Securities Inc.;

Roger M. Whelan, receiver for Monetary Services Corporation, Monetary Group N.V. and Monetary Group Government Securities Inc.;

The United States;

The Commodity Futures Trading Commission *(amicus curiae)*; and

The District of Columbia

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B Order entered May 18, 1988, United States District Court for the District of Columbia in C.A. No. 83-3685 et al., *Weil v. Markowitz* 10a

C Full text of United States Court of Appeals for the District of Columbia Circuit Opinion in No. 85-6002 et al., *Weil v. Markowitz*, decided September 22, 1987 (reported at 829 F.2d 166) 12a

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DONALD WEIL, General Partner,
TMG II a New York Limited Partnership,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Donald Weil, general partner of TMG II, a New York limited partnership, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 16, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 898 F.2d 198. That opinion affirmed an unpublished disposition of the United States District Court for the District of Columbia, entered May 18, 1988. An earlier opinion of the Court of Appeals is reported at 829 F.2d 166.

JURISDICTION

The opinion of the Court of Appeals for the District of Columbia Circuit was entered on March 16, 1990. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

A. Background

This case raises a question of fundamental importance to the administration of justice—whether the Government may, through the use of *ex parte* communications with a District Court, stay private party litigation. As a consequence of the stay, obtained by the *ex parte* communications, the Government was able to file against the civil defendant federal tax liens that the Government contends take priority over the civil plaintiff's judgment. Also at issue is whether *nunc pro tunc* relief should be available to rectify the consequences of the Government's misconduct.

B. The Litigation Below

TMG II was formed in 1980 as a New York limited partnership to engage in trading in commodities and government securities. Edward A. Markowitz was the managing general partner, and the business was carried on principally in Washington, D.C.

Unbeknownst to the limited partners and the other general partner, Donald Weil, Mr. Markowitz began to use the partnership as a vehicle to create mar-

ketable tax losses through fraudulent transactions. The profits from these fraudulent activities all redounded personally to Mr. Markowitz. In May, 1983, the Internal Revenue Service (IRS) opened a criminal investigation into Mr. Markowitz's activities. On November 15, 1983, Markowitz resigned as general partner leaving Mr. Weil, as he is today, the sole remaining general partner. App. 15a.

TMG II began the proceedings below on December 12, 1983, by filing Civil Action No. 83-3685 in the United States District Court for the District of Columbia against Markowitz, his sister, Debra Strahan, and three of Mr. Markowitz's corporations. Unaware of the criminal nature of Mr. Markowitz's activities, the suit: (1) alleged that the defendants had wrongfully diverted partnership business and property to themselves for their personal enrichment; and (2) requested an equity accounting, monetary repayment, and injunctive relief. App. 14a-15a.

Throughout the first three months of the litigation, Mr. Markowitz filed repeated but unsuccessful motions to dismiss TMG II's lawsuit or to stay it indefinitely. The stay motions were all based on Mr. Markowitz's allegations that he was the subject of an intense IRS criminal investigation; that TMG II was cooperating actively with the U.S. Government by giving the Government access to all the materials it was receiving from Markowitz in civil discovery; and that, to protect Markowitz's right to defend himself, TMG II's suit should be indefinitely stayed. App. 16a.

Mr. Markowitz was correct in one respect: from December 1983 through April 1984, TMG II was, indeed, actively cooperating—without inducement or

coercion—in the IRS' Washington, D.C. investigation of Mr. Markowitz and all of his entities. App. 17a.[1]

C. The Government's *Ex Parte* Contacts

On May 4, 1984, the United States Attorney for the Southern District of New York moved to intervene and to stay all discovery. The Government asserted publicly that a stay was necessary to protect its investigation of Markowitz.[2] The stay motion was supported by an affidavit of an Assistant U.S. Attorney, filed on the record. A second, separate af-

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[1] For example, in April 1984, Mr. Weil and undersigned counsel met with the IRS special agents investigating Mr. Markowitz. At that meeting, Mr. Weil explained to the agents the mechanics of Government securities trading. Mr. Weil told the agents everything he knew about TMG II and Mr. Markowitz. The agents, in turn, assured Mr. Weil that neither he nor TMG II was under investigation.

During the early months of 1984, the agents spent weeks in the offices of petitioner's counsel discussing in detail various aspects of the case and studying and microfilming *all* the voluminous Markowitz records that TMG II had obtained in C.A. No. 83-3685. TMG II's cooperation was especially important at this time, because Mr. Markowitz had previously refused to provide these same records to the Government, notwithstanding repeated Government subpoenas for them. The Government has admitted that TMG II's cooperation was helpful in its investigation.

[2] The Government selected this moment to intervene and seek a stay because only a few days earlier the District Court, over Markowitz's strenuous objections, had ordered disclosure by Markowitz's counsel of certain critically important documents alleged by Markowitz to be protected by the attorney-client privilege. Because of the Government's stay, these documents were not finally disclosed until December, 1987 in the course of other litigation brought by petitioner. When disclosed, they were, indeed, critically important and highly incriminating of Mr. Markowitz and his then counsel.

fidavit was delivered by the Government to the District Court Judge *ex parte*, without first seeking leave of Court, and without notice to TMG II's counsel. The Government was granted a provisional stay of discovery on May 7, 1984. App. 17a.

In its motion for a stay, the U.S. Attorney charged that Weil and his counsel were intentionally misusing civil discovery to get an illicit preview of the Government's criminal investigation. At a hearing on the motion on May 10, 1984, TMG II opposed entry of the stay arguing that a blanket stay of indefinite duration was unwarranted in fact and law.[3] App. 17a-18a.

On May 15, 1984, the District Court entered an order continuing the interim stay. However, the Court rejected the Government's request for an indefinite stay. It concluded instead that "a less restrictive safeguard of the Government's interests may be in order". It directed the Government, by May 22, 1984, to propose "a specific and narrowly framed protective order", with accompanying memoranda and affidavits, "addressed to specific deposition notices and document requests." App. 18a.

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[3] On May 9, 1984, a Wall Street Journal reporter examined the public file of the case in the District Court and discovered the *ex parte* affidavit which had been inadvertently filed publicly by the U.S. Attorney. Once informed by the reporter of the public filing, petitioner's counsel, within 30 minutes of the reporter's call, visited the clerk's office—only to discover that, by that time, the affidavit had been withdrawn from the public file and, by order of the District Court, placed under seal. The May 10, 1984 Wall Street Journal contained a front page article on the case and some aspects of the secret affidavit. App. 17a-18a.

Instead of doing so, the U.S. Attorney filed additional *ex parte* communications. On May 22, 1984, the U.S. Attorney delivered to the Court a second *ex parte* affidavit—again without first seeking leave of Court or providing prior notice to petitioner's counsel. On May 23, the United States Attorney for the District of Columbia delivered an *ex parte* letter to the Court. On May 24, the Court entered an order sealing both communications. Although technically the U.S. Attorney applied for leave to file these two *ex parte* documents, its motion was not served on TMG II until May 24 or May 25—the Government's certificate of service shows the backdated number "24" written over the number "25"—and TMG II did not receive it until well after the District Court had entered its sealing order. On June 6, 1984, the District Court granted a stay of all discovery and pretrial briefing obligations. App. 18a.

At a June 22, 1984 hearing to determine whether the ex parte communications should be made available to TMG II, the District Court refused to allow their disclosure to TMG II or its counsel. They have never since been disclosed.[4] During the hearing, the Court revealed, perhaps inadvertently, that the second *ex parte* affidavit alleged that Mr. Weil was a target, not merely a subject, of the Government's investigation:

> Well the reason you cannot [see the *ex parte* affidavit] is because your client is a target

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[4] A stay was also entered in a companion action, No. 84-1680, TMG Associates Custodial Committee v. Monetary Group, Ltd., et al. The stay in the companion action was similarly entered following *ex parte* contacts by the Government. The companion action is not before the Court.

> of an investigation which is the subject of the affidavit. If you can't understand that, you had better go back to law school.

When counsel asked whether TMG II's limited partners could see the *ex parte* materials, the Court responded:

> I don't care about your limited partners. They are in privity, for this purpose, with the partner who is the plaintiff.

The stay expired by its own terms on September 14, 1984. The Government did not seek to renew it.

Despite its *ex parte* accusations, the Government never charged Mr. Weil with anything. Nor has any evidence ever surfaced that Mr. Weil was ever a target of the Government's investigation. Nor has the Government ever suggested that any of the limited partners was in any way involved in Mr. Markowitz's criminal activities. As we shall discuss below, Mr. Markowitz subsequently pled guilty to four felonies.

D. The Effect of the Stay

When the United States intervened in C.A. No. 83-3685, trial had already been scheduled for October 22-26, 1984. *See* App. 28a-29a. Because of the stay, the case was removed from the trial calendar and all discovery postponed indefinitely. *See* District Court Order entered June 8, 1984. After the stay was lifted, the case was returned to the trial calendar, with trial not scheduled to begin until May 27, 1985. See District Court Order entered November 5, 1984.

Meanwhile, in late January 1985, the Government filed federal tax liens totalling more than $5 million

against Mr. Markowitz.[5] Parallel liens were filed against the corporate defendants. Settlement negotiations began between petitioner's and Markowitz's counsel in February 1985, shortly after the parties learned of the tax liens.

On April 24, 1985, a consent judgment and settlement agreement were tentatively concluded between counsel, agreeing to entry of judgment in the amount of $505,526.71 in favor of TMG II. The very next day, Markowitz pled guilty to a four-count criminal information in the United States District Court for the Southern District of New York.[6] App. 19a.

On the same date, the proposed consent judgment and settlement agreement were tendered to the District Court. The settlement agreement, however, specifically provided that each of the limited partners would be given personal notice of the proposed consent judgment and an opportunity to comment on it. The limited partners' comments were to aid the court, in the exercise of its discretion, to determine if the settlement should be entered, rejected, or modified. App. 19a-20a.

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[5] Some of the assets against which the Government levied were identified for the Government by petitioner's counsel during the course of his earlier cooperation. *See* n.1 *supra* and accompanying text.

[6] Count One of the information alleged that Mr. Markowitz generated limited partnerships, including TMG II and TMG Associates, to engage in non-existent and sham trading transactions in violation of 18 U.S.C. §371. Counts Two and Three charged that Mr. Markowitz aided and abetted the filing of false partnership returns for TMG II and TMG Associates in violation of 26 U.S.C. §7206(2). Count Four charged that Mr. Markowitz filed a false and fraudulent personal income tax return for the year 1981 in violation of 26 U.S.C. §7201.

A majority of TMG II's limited partners vigorously opposed the settlement, airing their views in written comments to the court and at a hearing before the magistrate. Citing both these objections and Mr. Markowitz's guilty plea, the magistrate recommended rejection of the settlement agreement. *See* 829 F.2d at 170; App. 20a. The District Court rejected the magistrate's report and, over the opposition of the limited partners, entered the consent judgment on August 30, 1985.

E. The First Appeal (Weil I)

In 1985, TMG II appealed to the United States Court of Appeals for the District of Columbia Circuit from the District Court's final judgment approving the settlement. One ground for the appeal was that the District Court exceeded its discretion in approving the final judgment over the objections of the vast majority of the TMG II limited partners. The Court of Appeals affirmed on that point.

The Court of Appeals did, however, find merit in TMG II's argument that the discovery stays, obtained through the use of *ex parte* means, gave the Government an unfair advantage *vis-a-vis* TMG II in executing on Mr. Markowitz's assets:

> A five day trial in No. 83-3685 was scheduled to begin October 22, 1984, and there probably would have been a final decree prior to the filing of the tax liens had the stays not issued. Appellants therefore request that relief in TMG II's favor be entered *nunc pro tunc* to October 26, 1984, the scheduled concluding date for the trial on the merits of C.A. 83-3685 [footnote text omitted].

App. 28a. The Court then determined that re-entry of the judgment *nunc pro tunc* to October 1984 was the only effective remedy remaining for TMG II:

> We agree with appellants' assertion that the entry of stays and the conduct of most judicial actions *ex parte* are generally disfavored in American jurisprudence. [citations omitted]. A total stay of civil discovery pending the outcome of related criminal matters is an unusual remedy appropriate for unusual circumstances. [citations omitted]. * * * The situation at hand is even more unusual because the government attempted and succeeded in staying the discovery of information by private parties. *The strength of the case law does not, however, change our belief that this Court need not attempt to unravel the complex web of facts concerning the propriety of the stays and ex parte communications when the only real relief available to the appellants is nunc pro tunc entry of the settlement order.*

See 829 F.2d at 174, n.17; App. 29a (emphasis added). The action was remanded so that the District Court could "appraise the factual basis" for entering judgment *nunc pro tunc* and to permit the District Court to "request from the Government any evidence, argument, or briefing that it believes is necessary". *Id.* at 175; App. 30a.

The Court of Appeals charged the District Court to consider fully all the facts and equities between TMG II and the Government and to adjust their respective lien priorities "as justice may require":

> As the Supreme Court has stated, a '*nunc pro tunc* order should be granted or refused, *as justice may require*, in view of the circumstances of the particular case.'

Weil v. Markowitz, supra, quoting *Mitchell v. Overman*, 103 U.S. 62, 65 (1881) (emphasis added); App. 30a.

F. The Remand to the District Court

In accordance with this Court's instructions, the *nunc pro tunc* issue was briefed by the parties on remand to the District Court. In its opening memorandum, TMG II maintained that it was entitled, on the merits, to *nunc pro tunc* re-entry of the final judgment *inter alia* on the following grounds:

> 1. the affirmative character of the Government's misconduct in repeatedly communicating with the District Court *ex parte*, and *in camera*, and without prior notice to opposing counsel;
>
> 2. TMG II's early and substantial cooperation with the Government in its Washington, D.C. investigation of Mr. Markowitz;
>
> 3. but for the Government's misconduct, TMG II's judgment lien would be senior to the federal tax liens.

The Government opposed *nunc pro tunc* relief *inter alia* on the following grounds:

> 1. that *nunc pro tunc* relief should not be granted because it has never been granted before on similar facts;
>
> 2. that even if no stay had been entered, there is no assurance that TMG II would have

> obtained its judgment against Markowitz in advance of the Government's tax liens;
>
> 3. the Government's Rule 24 intervention and *ex parte* communications did not subject it to the risk of adverse consequences flowing from issuance of the stay.

After hearing the parties' arguments but without conducting an evidentiary hearing, the district court delivered a bench ruling denying appellant *nunc pro tunc* relief. The court stated:

> [T]he plaintiff has failed to prove by a preponderance of the evidence . . . that there is a causal connection between the four-month stay and the priority which the Government now has for its lien. . . . [I]f the case had been settled in October, as [appellant] hypothesized, and there had been a controversy about it thereafter, as the Government hypothesized, . . . the judgment on the settlement would not have been enterable[ ] until after the Government lien had attached.
>
> I am further persuaded by the arguments of both parties . . . that the imminence of the trial date and/or the entry of settlement would have concentrated the Government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered.

App. 32a. TMG II's application for *nunc pro tunc* relief was formally denied by entry of the May 18, 1988 order. App. 11a.

G. The Second Appeal (Weil II)

TMG II appealed the District Court's order denying the application for *nunc pro tunc* relief to the United States Court of Appeals for the District of Columbia Circuit. As noted, in *Weil I*, the Court of Appeals charged the District Court, on remand, to consider fully all the facts and equities between TMG II and the Government and to adjust their respective lien priorities "as justice may require".

In *Weil II*, TMG II maintained that the District Court departed from these instructions. TMG II argued that the District Court erroneously reduced the *nunc pro tunc* remand to an exercise in proximate cause metaphysics. For all practical purposes, TMG II was required to prove that, but for the stay of civil proceedings, TMG II would have reduced its claims to judgment before the Government filed its tax lien. TMG II was thus required to show—to an impossible degree of certainty—*what would have happened* had no stay been entered.

The Court of Appeals affirmed the District Court's disposition of the *nunc pro tunc* remand. As pertinent to this petition for certiorari, the Court of Appeals approved the District Court's refusal to consider either the Government's *ex parte* communications with the District Court or TMG II's cooperation in the Markowitz investigation as factors bearing on the availability of *nunc pro tunc* relief:

> [T]he district court, contrary to Weil's argument for a more expansive consideration of various 'equitable factors,' correctly declined to consider such matters as TMG II's assistance to the Government during its in-

> vestigation and the Government's alleged misconduct in obtaining the stay upon the basis of an *ex parte* submission to the court. Neither of these issues is relevant to the question of whether the stay enabled the Government to gain temporal priority for its tax lien.

See 898 F.2d 198 at 201; App 6a. Instead, the Court of Appeals held, as did the District Court, that TMG II could not prove that, even if no stay had been entered, the Government's federal tax liens against Mr. Markowitz and his companies would not have attached prior to TMG II's judgment. App. 6a-7a.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court's jurisdiction was based on diversity of citizenship, pursuant to 28 U.S.C. §1332. In addition, there were claims before the District Court based on the Commodities Exchange Act, 7 U.S.C. §§1-26 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-68, both of which contain direct grants of federal subject matter jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING ISSUES CONCERNING THE CIRCUMSTANCES UNDER WHICH THE GOVERNMENT MAY MAKE *EX PARTE* COMMUNICATIONS TO A TRIAL COURT

Ex parte proceedings based on secret, in-chambers representations are abhorrent to the American system of jurisprudence:

> Surely our whole jurisprudence since the Magna Carta and the abolition of Star Chamber proceedings requires that the judiciary in both fact and appearance remain neutral, independent of executive or legislative influence. The adversary system is a well tested safeguard for preserving the integrity of the judicial process. It is the duty of the judge to resolve the rights of citizens upon facts and arguments that are presented in an adversary context exposed to public view, with all the protections fair hearings and due process provide.

Military Audit Project v. Bush, 418 F.Supp. 876, 878 (D.D.C. 1976) (Gesell, J).

All applicable professional and judicial ethical codes bar unauthorized *ex parte* communications between lawyers and judges. Code of Professional Responsibility Disciplinary Rule 7-110(b)[7] prohibits a lawyer from making an unauthorized *ex parte* communication to a Court concerning the substance of a pending proceeding:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
>
> (1) In the course of official proceedings in the cause.

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[7] At the time the events occurred the District of Columbia bar was regulated by the Code of Professional Responsibility.

> (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (4) As otherwise authorized by law.

Similarly, section 3(A)(4) of the Code of Judicial Conduct prohibits a judge from receiving an unauthorized *ex parte* communication concerning the substance of a pending proceeding:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceedings.

The "authorized" exceptions to the rule against *ex parte* communications are few. They include threshold determinations of a claim of evidentiary privilege, disclosure of the content of grand jury proceedings, and *in camera* review of Freedom of Information Act material. *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977); *Military Audit Project v. Bush, supra*. Even the exceptions are carefully circumscribed. The grand jury exception, for example, is limited to grand jury minutes and testimony. *In re Special September 1978 Grand Jury*, 640 F.2d 49, 56-58 (7th Cir. 1980); *Appeal of Hughes*, 633 F.2d 282, 290-91 (3d Cir. 1980). Particularly to be avoided is the adjudication of in-

dividual rights by the use of secret proceedings. *In re Taylor, supra.*

Even in those rare cases where *ex parte* contacts are arguably permitted, Courts have been known to refuse to hear the matter secretly and, instead, to utilize procedures less constitutionally suspect. E.g., *U.S. v. Dinesio*, 468 F.2d 1392, 1394 (9th Cir. 1972) (*ex parte* communications by Government examined by adversary to permit response, under seal, on the merits); *Matter of Archuleta*, 432 F.Supp. 583 (S.D.N.Y. 1977) (*ex parte* communications not read by Court) (per Lasker, J.).

Petitioner submits that the communications made below to the District Court—from a non-party and without prior notice to opposing counsel—are beyond the pale of any authorized exception to the bar on *ex parte* contacts. That these several *ex parte* filings tainted the atmosphere in the District Court and prejudiced the Court against TMG II's claims and counsel can hardly be denied; and the Government to date has not done so. Nor can it be denied—as the Government now knows—that much of the contents of its *ex parte* communications to the Court was patently false. In *Weil I*, the District of Columbia Circuit appeared to appreciate the impact of the Government's misconduct. *See* 829 F.2d at n.17, App. 29a. *See* also *Magnus Electronics, Inc. v. Masco Corporation of Indiana*, 871 F.2d 626 (7th Cir. 1989).

Unfortunately, the United States still does not. In the U.S. District Court for the District of Columbia, for example, even after the Court of Appeals decision in *Weil I*, the Government once again delivered to a District Court *in camera ex parte* communications in a case totally unrelated to the matter below. *Golden*

Pacific Bancorp v. Clarke, 267 U.S.App.D.C. 86, 837 F.2d 509 (1988).

In *Golden Pacific*, a bank appealed from a District Court order entering summary judgment against it on a claim for damages under the Federal Tort Claims Act and the takings clause of the Fifth Amendment. The bank maintained, *inter alia*, that summary judgment was granted on an administrative record that was incomplete owing to the Government's refusal to lodge with the District Court certain documents turned over to the examiners by bank officers, pending a criminal investigation by the U.S. Attorney's Office in New York City. As in *Weil v. Markowitz*, the Government sought and obtained stays of appellant's discovery based on *ex parte in camera* filings. The Court of Appeals did not need to reach the *ex parte* contacts issue to decide the appeal. Nevertheless, it issued the following stern dicta on the Government's continuing practice of making *ex parte in camera* communications with District Court Judges:

> The Government sought and obtained stays of appellant's discovery based on *in camera* filings. We have previously expressed our concern with this procedure employed by the Justice Department. See *Weil v. Markowitz*, 829 F.2d 166, 174 & n. 17 (D.C.Cir.1987), and we do not believe the Government entitled to litigate the merits of the Comptroller's actions on an incomplete record because of a pending criminal proceeding.

It is, of course, difficult to quantify the problem of unauthorized *ex parte* communications throughout the federal judicial system. Often, cases in which *ex parte*

contacts occur are understandably not the subject of reported decisions. At other times, the procedural posture of the case is such that the *ex parte* communications do not assume dispositive significance. There is no doubt, however, that it is a recurring problem and a problem that is deeply troubling to the District Courts and the Courts of Appeals. It will remain a problem until this Court speaks clearly and definitively on the subject.[8]

This Court has not previously considered the precise question posed by this petition. However, its recent decision in *Texas v. New Mexico*, 485 U.S. 388, 108 S. Ct. 1201, 99 L.Ed.2d. 450, 56 U.S.L.W. 3664 (1988), suggests the importance it attaches to the integrity of the adversarial process. *Texas v. New Mexico* is a long-running dispute over New Mexico's

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[8] While no hard numbers are available about how often the Government employs *ex parte in camera* methods to achieve its ends, there were at least two other cases involving Markowitz-related controversies where the Government did so. In the U.S. District Court for the Eastern District of Virginia, *McLean Financial Group v. Damaso*, C.A. 87-1288A, the Government similarly sought a stay of discovery relying on an *ex parte* affidavit submitted *in camera*. Judge Claude M. Hilton of the Eastern District reportedly accepted the papers but, on May 13, 1988, denied the stay. In *TMG II et al. v. Rees, Broome & Diaz, et al.*, District of Columbia Superior Court Civ.Act. 4570-86, the Government, again using *ex parte in camera* methods, sought to stay disclosure of the very same discovery materials they sought successfully to suppress in May 1984 in the instant case. *See* n. 2 *supra*. Once alerted to the precedent of *Weil I*, Judge Peter Wolf orally indicated that he would not read the Government's *ex parte* submissions and would not grant a stay. Petitioners wrote the Justice Department, inquiring whether there are any published guidelines or policies regarding *ex parte* contacts. The Department never responded.

obligation to deliver water to Texas under the Pecos River Compact. The 1988 decision pertains to the Court's appointment of a River Master to monitor New Mexico's compliance with Article III(a) of the Compact.

Section III of the Court's decision contains the terms of the River Master's appointment. Section III-F pertains to *ex parte* contacts. Such contacts are strictly prohibited:

> Communication with River Master.
>
> *Ex parte* communications with the River Master are forbidden. Any written communication with the River Master by motion or otherwise shall be simultaneously served by mail on the opposing party. Any oral communication with the River Master shall be made in the presence of the opposing party, whether by telephone conference call or in person.

Even if the Court were to conclude that unauthorized *ex parte* communications are not, quantitatively, a regularly recurring problem, such contacts are, qualitatively, a profound affront to the judicial process. An exercise of this Court's supervisory powers is unquestionably required.

II. THE DECISION BELOW RAISES SIGNIFICANT ISSUES CONCERNING THE AVAILABILITY OF *NUNC PRO TUNC* RELIEF

A judgment entered *nunc pro tunc* is one given effect as of a date in past. 6A Moore's *Federal Practice*, Para. 58.08 (1985 ed.) at 58-75. The entry of judgment *nunc pro tunc* is available both at law and

in equity. *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1881).

Entry of judgment *nunc pro tunc* is most often used in cases where there is ministerial error following judgment or where one of the parties to the suit dies following submission of the case for decision. *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390 (1912). Its use, however, is virtually unlimited where retrospective entry of a judgment or decree is needed to do full justice to the parties:

> The rule established by the general concurrence of the American and English authorities is that where the delay in rendering a judgment or decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions, involved, *or of any other cause not attributable to the laches of the parties*, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up.

Mitchell v. Overman, supra, at 64-65 (emphasis added).

In *Weil I*, the Court of Appeals did not directly chastise the Government for securing the discovery stays based on *ex parte* contacts. It did indicate, however, that the question was to be taken up on remand by the *District Court* as part of the determination of whether *nunc pro tunc* relief should be entered as a corrective to the Government's misconduct:

> The strength of the case law does not, however, change our belief that *this* Court need not attempt to unravel the complex web of

> facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to the appellants is *nunc pro tunc* entry of the settlement order.

See 829 F.2d at n.17; App. 29a (emphasis added). Thus, while the Court of Appeals declined to "unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications", it clearly expected the District Court to do the unraveling on remand. On remand, the District Court should have considered not just the fact that the stay was entered but the circumstances that led to its entry.

Instead of unraveling the web, the District Court wound it tighter. The District Court failed to determine whether there was any justification for the Government to resort to *ex parte in camera* communications to stay the petitioner's case. It similarly did not consider whether there may have been some means short of *ex parte* communications, without prior notice to counsel or leave of court, by which the Government could have achieved its ends. Nor did the District Court examine whether, as petitioner claimed, the *ex parte* communications were not only inaccurate but had a very substantial continuing adverse impact on the judicial process. Similarly, the Court declined to consider whether the Government's misconduct—that persuaded the Court of Appeals to remand the case—should be weighed in any way in determining whether *nunc pro tunc* relief was justified.

Instead, the Court erroneously reduced the *nunc pro tunc* remand to a hypothetical proximate cause exercise requiring TMG II to bear the almost impossible burden of proving that, but for the stay, TMG

II would surely have obtained judgment against Mr. Markowitz before the Government filed its tax lien. The Court of Appeals' affirmance did nothing to correct these deficiencies. Indeed, the Court of Appeals was reluctant even to criticize the Government's reliance on *ex parte in camera* means to achieve its ends.

CONCLUSION

Weil II, we respectfully submit, not only ignored the significant adverse impact that the Government's *ex parte* communications had on the judicial process in the District Court, but it did not even address the increasingly important subject of whether and, if so, under what circumstances such communications should ever be allowed. By avoiding these issues, of great concern to the bench and bar throughout this country, the Court was also able to avoid confronting the other significant issue in the case, namely, whether the doctrine of *nunc pro tunc* relief, as set forth by this Court in *Mitchell v. Overman*, should be broadly available to rectify, as here, an extraordinary form of misconduct, that, to the extent it can be remedied at all, can only be remedied by entry of retroactive relief.

We would be less than candid if we did not express our profound distrust, in any but the most compelling circumstances, of executive branch *ex parte* contacts with the judiciary of this country. It is not an exaggeration to say that similar contacts by foreign government officials, even well meaning, very often work to destroy the integrity of the judicial processes in those countries. We are not suggesting the United States in on that path today. But with clear evidence

of our Government's increasingly frequent resort to such practices, we believe this may be a most propitious time for the Court to address itself to the issue and to clarify, both for sitting District Court judges and for participating counsel throughout the country, when and when not the practice is to be tolerated.

This is a uniquely appropriate case, moreover, to address that issue. For it is not often that the issue can be properly framed for an appeal, and it is even less often when, as here, there is a practical form of relief that is available to remedy the misconduct. Finally, in deciding whether or not to grant that relief, this Court can also address itself for the first time since its 1881 decision in *Mitchell v. Overman*, to the scope of relief that ought properly be available under the *nunc pro tunc* doctrine.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

No. 88-5289.

Donald WEIL, General Partner, TMG,
II, a New York Limited Partnership,
Appellant,

v.

Edward A. MARKOWITZ, *et al.*

Argued Dec. 11, 1989.
Decided March 16, 1990.

Appeal from the United States District Court for the District of Columbia (CA 83-03865).

Marvin L. Syzmkowicz, with whom Allan I. Mendelsohn was on the brief for appellant.

Joan I. Oppenheimer, Attorney, Dept. of Justice, of the bar of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, pro hac vice, by special leave of Court, with whom Jay B. Stephens, U.S. Atty., Shirley D. Peterson, Assistant U.S. Atty., and Gary R. Allen, Attorney, Dept. of Justice, were on the brief for appellees. William S. Rose, Atty., Dept. of Justice, also entered an appearance.

Before EDWARDS, BUCKLEY and D. H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge D. H. GINSBURG.

D.H. GINSBURG, Circuit Judge:

Before us for the second time is the settlement between TMG II, a limited partnership the sole remaining general partner of which is appellant Donald Weil, and appellee Edward Markowitz, a former general partner of TMG II. The background of this dispute is more fully described in our earlier decision, *Weil v. Markowitz*, 829 F.2d 166, 167-70 (D.C.Cir.1987) (Weil I), in which we remanded to the district court "the question of whether the settlement order should be entered *nunc pro tunc*." We recount here only what is necessary in order to explain our affirmance of the district court's decision answering that question in the negative.

I. Background

In *Weil I*, we affirmed the district court's decision approving the settlement agreement. We declined, however, to address the merits of Weil's claim that the district court had earlier "erred in granting the government's motion to stay [civil discovery] proceedings [in] apparent reliance on *ex parte* materials" relating to a criminal investigation into the same parties and affairs that were involved in this litigation. According to Weil, "the *ex parte* materials and the stays had significant and deleterious effects, because they resulted in a one year delay of trial that permitted the IRS to file tax liens against Markowitz [*et al.*] before appellants could secure a final decree and enforce a judgment lien against them." *Id.* at 174. We found that it was unnecessary, however, to "attempt to unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to the appellants is *nunc pro tunc* entry of the settlement order." *Id.* at 174 n. 17.

With respect to that relief, we noted that "the principle underlying entry of a judgment or an order *nunc pro tunc* is that of fairness to the parties," and we adduced two

considerations that might make such relief appropriate in this case. *Id.* at 174-75. First, because the Government had been granted *nunc pro tunc* relief in a related proceeding (rescinding its intervention as of the date it had been granted), we thought that in fairness "an opportunity for similar relief" should be available to Weil. Second, because "the government's intervention was intended to protect a criminal investigation[, we found it] unclear why the District Court's acquiescence for this narrow purpose should confer an advantage to the government in enforcing its civil tax lien." *Id.* at 175.

We declined to resolve the issue of whether to grant *nunc pro tunc* relief, however, because we were concerned that the Government, "which stands to lose its tax lien priority if judgment is entered *nunc pro tunc* [and is therefore] the real party in interest, . . . [was] not a party to [that] appeal and therefore [could not] defend its interests." The determination of what "justice may require" must rest upon a "proper factual basis," but that could not be assured "without the participation of the real party in interest." *Id.*

On remand, immediately after hearing the parties' arguments but without conducting an evidentiary hearing, the district court delivered a bench opinion denying appellant *nunc pro tunc* relief. The court stated:

> [T]he plaintiff has failed to prove by a preponderance of the evidence . . . that there is a causal connection between the four-month stay and the priority which the Government now has for its lien. . . . [I]f the case had been settled in October, as [appellant] hypothesized, and there had been a controversy about it thereafter, as the Government hypothesized, . . . the judgment on the settlement would not have been enterable[ ] until after the Government lien had attached.

> I am further persuaded by the arguments of both parties . . . that the imminence of the trial date and/or the entry of settlement would have concentrated the Government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered.

On this appeal, Weil contends as an initial matter that the district court should have found that, because the Government declined to participate in the earlier appeal to this court, it is estopped from challenging TMG II's right to *nunc pro tunc* relief. On the merits, Weil argues that the district court erroneously applied a "technical, tort-type standard of proximate cause" that in effect required him to prove that, if the court had not stayed the civil proceedings, TMG II would have filed its lien before the Government filed its tax lien. Instead, Weil suggests the district court should have considered a number of "equitable factors" in order to arrive at a "just" solution, which would of course mean granting him relief *nunc pro tunc*. Weil asks this court not only to order the entry of such relief, but also "to clarify and restate the law in favor of communications on the record and against *ex parte* contacts."

II. Analysis

We need not address at any length Weil's initial argument that the Government is estopped by its prior non-participation from disputing the priority of TMG II's judgment. Our earlier opinion clearly indicates that we intended that the Government have an opportunity to address whether the court should grant *nunc pro tunc* relief; that is the law of the case, and it precludes the present argument for estoppel.

With respect to the principal issue before us, we hold that the district court did not err in concluding that Weil

has failed to demonstrate that the stay resulted in the Government's lien gaining priority; nor did it abuse its discretion, therefore, in determining that *nunc pro tunc* relief would not serve the interests of justice. Consequently, we affirm the decision of the district court without need to address the other issues that the parties have raised.

In our earlier opinion, we stated that the issue of whether to grant *nunc pro tunc* relief is "best left to the discretion of the District Court." *Id.* As that court correctly understood, our explanation that *nunc pro tunc* relief is available in order to promote "fairness to the parties," and " 'as justice may require,' " *id.* (quoting *Mitchell v. Overman*, 103 U.S. (13 Otto) 62, 65, 26 L.Ed. 369 (1881)), neither directed nor authorized it to engage in a boundless consideration of "equitable factors."

Nunc pro tunc relief has been granted only in a limited number of circumstances, where its entry is necessary to avoid, and does not create, an injustice at the hands of the court itself. The paradigm case involves a party who has died after his case has been submitted to the court, but before the court has entered judgment. *See, e.g., Mitchell*, 103 U.S. at 65 (affirming state court's entry of judgment for deceased plaintiff as of time case was submitted, in order "to see that the parties shall not suffer by the [court's] delay" in deciding case). Cases in which a party would otherwise be prejudiced by the clerk's delay in entering the judgment stand upon the same footing. *See, e.g., United States v. Chicago & A.R. Co.*, 250 F. 101, 102 (7th Cir.1918). *Nunc pro tunc* relief may also be available, in some jurisdictions, "under extraordinary circumstances where [it] will not prejudice any party" and is necessary in the interests of justice. *In re Auto-Train Corp.*, 810 F.2d 270, 275 (D.C.Cir.1987) (dictum); *see In re Triangle Chemicals, Inc.*, 697 F.2d 1280 (5th Cir.1983).

Consistent with this limited availability of *nunc pro tunc* relief, our sole concern in *Weil I* was that it might be unreasonable for the Government to gain priority for its lien by virtue of having secured, in the civil proceedings between TMG II and Weil, a stay that was justified upon other grounds, *viz.* the protection of its on-going criminal investigation. This court was agnostic on the question of whether *nunc pro tunc* relief would, even in principle, be an appropriate means by which to prevent the Government from gaining such an advantage; because the Government was not a party to the prior appeal, that issue simply was not joined and thus was not decided.

In any event, it is equally clear that it would be inappropriate for the Government, because of its intervention, to lose a priority it would otherwise have had. In other words, if TMG II's claim would not have had priority over that of the Government absent a stay, there is no reason why it should have priority merely because the Government obtained a stay. Therefore, although Weil is correct that we instructed the district court to consider what "justice may require," the district court is equally correct in concluding that justice here requires, at most, only that Weil neither be hurt nor helped by the stay.

It follows that the district court, contrary to Weil's argument for a more expansive consideration of various "equitable factors," correctly declined to consider such matters as TMG II's assistance to the Government during its investigation and the Government's alleged misconduct in obtaining the stay upon the basis of an *ex parte* submission to the court. Neither of these issues is relevant to the question of whether the stay enabled the Government to gain temporal priority for its tax lien. As we have said, we "need not attempt to unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to the appellants is *nunc pro tunc* entry of the settlement order." 829 F.2d at 174 n. 17. Similarly irrelevant is appellant's

assertion that the *ex parte* contacts prejudiced the district judge against him, a broadside that lacks any factual support.

Contrary to appellant's assertion, the district court did not require him to show beyond "every last doubt, uncertainty and ambiguity" that, but for the stay, his lien would have had priority over that of the Government. Instead, the court found that appellant did not make such a showing "by a preponderance of the evidence," based upon two factors. First, Weil proffered insufficient reason to believe that if the original trial schedule had been followed, the problems and delays that actually arose once the stay expired and the litigation was resumed would not still have arisen and thus caused the judgment in his favor to be entered after the Government's lien had attached. Second, the Government was aware of what was going on in the civil case and, had there never been a stay of the proceedings, it would surely have secured its lien earlier, as it could easily have done, in order to achieve priority over the judgment.

We find the first of these reasons persuasive, and the second conclusive. Before the Government obtained the stay, which was entered on May 7, 1984, the court had scheduled the trial to begin on October 22 and expected it to last five days. It is possible that, held to this schedule, the trial would have settled the dispute in October. On the other hand, since the parties ultimately settled, absent some change in the pressures impelling settlement on one side or the other had there never been a stay, we have to believe they would likewise have settled without going to trial in late October. Under the terms of the settlement they in fact later reached, however, judgment would still not have been entered by the court until considerably later. That settlement, submitted for court approval in late April 1985, called for its circulation to each of the limited partners for an opportunity to object, which procedure consumed additional months as the objections were

entertained. Whether this process would have been completed, absent the stay, prior to the date on which the Government actually filed its tax lien (January 14, 1985) is anybody's guess.

Weil argues, however, that the stay did in fact alter the dynamics of settlement. Weil asserts that the stay prevented the discovery in May 1984 of certain documents from Markowitz's attorney. These documents were, according to Weil, so damaging to Markowitz that their disclosure would have forced an earlier settlement (and one more favorable to Weil). The effect of earlier disclosure of these documents is, however, entirely speculative: we do not know whether Markowitz would have settled earlier if they had been released, and Weil does not even suggest that the hypothetical settlement more favorable to him would not still have had to be submitted to the limited partners. We are unwilling to overturn the district court's finding based upon speculation that treats as probable what can at best be deemed possible.

Weil also maintains that the time it took to settle the case after expiration of the stay is not indicative of the time that would have been required but for the stay because the stay eliminated the October deadline ("discovery, like work, expands to the time allotted to fill it"), and propelled the case into a period when it competed for attention with collateral matters, such as the winding up of one of the corporate defendants. These observations are not without their force, but it is the force exerted by a proposition that cannot be denied, not one that must be admitted. The overwhelming fact is that the stay was in force only from May 7 until September 14, just over four months, whereas the district court entered the settlement on August 30, 1985, almost one full year after the stay had expired (and more than seven months after the Government filed its tax lien). We do not think it the more likely that, but for the stay, entry of a settlement would have come between May and October when in fact, once

the clock started to run again with the expiration of the stay, it took the parties a year to accomplish that result.

The district court's second basis for denying *nunc pro tunc* relief is even less susceptible to objection on the basis of such speculations. The court noted that the Government was clearly aware of the course of events in the action between TMG II and Markowitz and of the impact that a settlement would have upon its own claim against Markowitz. If there had been no stay, then when word of an impending settlement reached the Government, or the parties proposed an actual settlement for the court's approval, during the pretrial period from May to October 1984, the Government certainly would have entered its lien at that time. In the event, the Government waited until January 1985 to file its lien, but until that time, it knew that there was no danger of its losing priority to a judgment lien; in fact, there were not even any settlement negotiations between TMG II and Markowitz until February 1985, some five months after expiration of the stay.

The district court thus reasonably concluded that Weil has failed to demonstrate that, but for the stay, TMG II's claim against Markowitz would have had priority over that of the Government.

III. Conclusion

The district court's holding rests upon the factual determination, for which there is ample support, that TMG II would not have secured its lien first even if the Government had never obtained a stay. The interests of justice would not be served, therefore, by the entry of Weil's judgment *nunc pro tunc*. Accordingly, the decision of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3685-LFO

DONALD WEIL, *et al.*,

Plaintiffs,

v.

EDWARD A. MARKOWITZ, *et al.*,

Defendants.

Civil Action No. 84-1680-LFO

TMG ASSOCIATES CUSTODIAL COMMITTEE, *et al.*,

Plaintiffs,

v.

MONETARY GROUP LIMITED, *et al.*,

Defendants.

Civil Action No. 85-2469-LFO

TMG II, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendants.

FILED

MAY 18 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

The Court of Appeals remanded for the trial court's consideration the question of whether the judgment entered on August 30, 1985 in favor of plaintiff TMG II should be re-entered *nunc pro tunc* to October 26, 1984. *See Weil v. Markowitz*, 829, F.2d 166 (D.C. Cir. 1987). This Court has considered TMG II's application for and memorandum in support of *nunc pro tunc* judgment entry, the United States' opposition and TMG II's reply and, on April 26, 1988 heard oral argument. For reasons stated from the Bench on that date, it is this 17th day of May, 1988, hereby

ORDERED: that plaintiff TMG II's application for *nunc pro tunc* re-entry of the August 30, 1985 judgment is DENIED.

/s/ Louis F. Obedorfer
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals,
District of Columbia Circuit.

Nos. 85-6002, 85-6003, 85-6110 and 85-6111.

Donald WEIL, *et al.*,

Appellants

v.

Edward A. MARKOWITZ, *et al.*

(Two Cases).

TMG ASSOCIATES CUSTODIAL COMMITTEE, *et al.*,

Appellants

v.

MONETARY GROUP LIMITED, *et al.*

(Two Cases).

Argued Oct. 15, 1986.
Decided Sept. 22, 1987.

Appeals from the United States District Court for the District of Columbia (Civil Action No. 84-01680 Civil Action No. 83-03685).

Allan I. Mendelsohn, with whom Marvin L. Szymkowicz, Washington, D.C., was on brief, for appellants.

Charles S. Fax, for appellees. Austin J. Doyle, Jr., Washington, D.C., and Harry A. Suissa, Chevy Chase, Md., were on brief, for appellees.

Joseph Semo, Washington, D.C., was on brief, for amicus curiae.

Before STARR and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

McGOWAN, Senior Circuit Judge:

In these appeals, two limited partnerships (appellants) assert that the District Court abused its discretion in its modification and entry of a settlement agreement, as well as in several rulings that preceded settlement. The settlement disposed of two actions: in the first, one of the appellants (TMG II) brought suit against Edward A. Markowitz, Debra Strahan, and three corporate defendants, alleging that these five had diverted partnership property and business to themselves in violation of state and federal laws, and seeking equitable and monetary relief. In the second, the other appellant (Custodial Committee) made similar claims and sought similar relief against Markowitz and two corporate defendants.

These suits coincided with a criminal investigation of the same defendants by the Internal Revenue Service, an investigation that began shortly before the filing of the first civil complaint and ended shortly after the parties reached settlement. This investigation had prompted the defendants to move repeatedly but unsuccessfully for a stay of civil proceedings, assertedly to avoid incriminating responses to discovery requests. The District Court denied the last of these motions in an order suggesting that the motion had been filed in violation of Rule 11 of the Federal Rules of Civil Procedure. Subsequently, the United States intervened, seeking and obtaining a stay, ostensibly to protect its continuing investigation of the defendants and others. The principal parties in the civil suit reached settlement thereafter, but their agreement excluded Stra-

han. The District Court entered the agreement, and also dismissed Strahan as a defendant, in an order on September 3, 1985 (settlement order), that closely followed Markowitz's guilty plea to four counts of felony tax fraud in the criminal case.

Appellants here challenge the District Court's entry of the settlement order, its dismissal of Strahan from the suit, its failure to impose sanctions for the apparent Rule 11 violation, and its stay of discovery on a motion of the United States Attorney for the Southern District of New York supported by *ex parte* affidavits. For the reasons that follow below we: (1) remand the District Court's order suggesting that a Rule 11 violation occurred for clarification and possibly for sanctions; (2) affirm the District Court's approval of the settlement agreement; (3) vacate and remand judgment as to defendant Strahan, who was improperly dismissed from the lawsuit; and (4) remand to the District Court's consideration, without passing on the propriety of the contested stays, the question of whether the settlement order should be entered *nunc pro tunc*.

I.

Appellant TMG II began the proceedings below on December 12, 1983, by filing No. 83-3685 against Edward A. Markowitz, Debra Strahan, and three corporate defendants.[1] Markowitz was the managing general partner

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[1] These corporate defendants were Monetary Services Corporation; The Monetary Group, NV; and Monetary Government Securities, Inc.

The corporate defendants are referred to as follows:

Monetary Group, Ltd. as "MGL"

Monetary Group, N.V. as "NV"

Monetary Group Government Securities, Inc. as "GSI"

Monetary Services Corp. as "MSC"

All litigation on behalf of TMG II, including this appeal, was brought

of TMG II, a New York limited partnership formed in 1980; Markowitz also was the president and sole shareholder of the corporate defendants. One of these corporate defendants, MGL, served in turn as the corporate general partner of another limited partnership, TMG Associates, which was formed in 1979. The IRS investigation that ultimately led to Markowitz's undoing prompted him and MGL to resign from their respective posts as general partners on November 15, 1983. In response to MGL's resignation, the remaining limited partners of TMG Associates formed a Custodial Committee, to look after their interests. This Custodial Committee brought an action, No. 84-1680, against Markowitz, MSC, and MGL on May 31, 1984.

Both TMG II and TMG Associates purportedly were formed as broker-dealers and market-makers in the commodities and metal markets. Under Markowitz's direction, however, the actual business of the partnerships apparently became the creation of marketable tax losses through sham transactions in precious metals and government securities. D.E. 20. These schemes ended with the criminal investigation, and with allegations by Markowitz's partners that he and Strahan had diverted partnership business and property to themselves. TMG II initially sought an equity accounting, monetary repayment, and injunctive relief. D.E. 1. On January 20, 1984, TMG II amended its complaint, asking the court to void certain allegedly fraudulent transfers of property to Strahan, and to award damages for violations of the Commodities Exchange Act, 7 U.S.C. §§ 1-26 (1982), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1982 & Supp. III 1985). D.E. 45.

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in the name of Donald Weil, its remaining general partner, who had a 35% general partnership in TMG II but who had no day-to-day responsibilities.

All references to the certified Docket Entries in C.A. 83-3685 are in the form of "D.E. ____". All references to the certified Docket Entries in C.A. 84-1680 are in the form of "D.E. (84-1680) ____."

The Custodial Committee, too, joined claims for equitable relief against the partners with parallel claims for damages against the corporate defendants. In its five-count complaint, the Custodial Committee requested an equity accounting and repayment of money either misappropriated by Markowitz and MGL, or lost as a result of mismanagement or breaches of fiduciary duty. Violations of the Commodities Exchange Act, 7 U.S.C. §§ 1-26, also were alleged. D.E. (84-1680) 1.

Before the Custodial Committee had even filed suit, however, Markowitz repeatedly filed motions to dismiss or to stay all civil proceedings in which he was a named defendant. Markowitz filed the first of these motions, none of which succeeded, on December 20, 1983, arguing that he could only respond truthfully to civil discovery by compromising his fifth amendment right against self-incrimination. D.E. 13; Supporting Memorandum in D.E. (84-1680) 1. Markowitz and the corporate defendants then started a series of motions to dismiss the action on either jurisdictional or substantive grounds, or both. Markowitz also renewed his request for a stay, in an oral motion of February 9, 1984, which was denied from the bench. Unnumbered D.E. between 96 and 97. He moved a third time for a complete stay of all proceedings on March 4, 1984.

This third motion again was based on what Markowitz described as the active government investigation of him and other defendants in which, Markowitz asserted, TMG II and its counsel were cooperating by permitting access to discovery responses. In opposing the motion, TMG II asserted that Markowitz had failed, on the merits, to justify a total stay of proceedings pending the outcome of the criminal investigation, and asserted that the motion was interposed for delay in violation of Rule 11. On April 4, 1984, the court denied the motion, stating that "it appeared that the motion was filed in violation of Rule 11."

The government, by contrast, was able to secure the stay that eluded Markowitz. Even though Donald Weil and TMG II's counsel were cooperating with the government, the United States Attorney for the Southern District of New York moved to intervene in No. 83-3685 and to stay all discovery, based on the government's asserted need to protect the Markowitz investigation. The motion for a stay was supported by an affidavit of an Assistant U.S. Attorney and by a second, separate affidavit, which was filed by the government ex parte and without notice to opposing counsel. On the basis of these submissions, the government was granted a provisional stay of discovery on May 7, 1984.

In its motion for a stay, the U.S. Attorney charged that Weil and his counsel were intentionally misusing discovery to get an illicit preview of the government investigation, and disclosed that all of the parties to the civil suit were subjects of that same investigation. At a hearing on the motion on May 10, 1984,[2] TMG II opposed entry of the stay and argued, in the alternative, that the blanket stay of indefinite duration requested by the government would be unwarranted in fact and law.

On the morning of the hearing, the contents of the *ex parte* affidavit, which mistakenly was put in the public

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[2] Among those personally appearing on behalf of the United States were two Assistant U.S. Attorneys for the Southern District of New York; the Chief of the Criminal Division, U.S. Attorney for the District of Columbia; the Executive Assistant U.S. Attorney for the District of Columbia; the U.S. Attorney for the District of Columbia; and the Deputy Assistant Attorney General for the Tax Division, United States Department of Justice.

At this hearing, the U.S. Attorney for the District of Columbia advised the court that the motion for stay had been improvidently filed and would be "supplanted" by a subsequent pleading. Tr. at 7-8. Later the same day, a new pleading was filed stating that discovery should be stayed not because Weil allegedly had misused discovery, but to prevent his doing so in the future. D.E. 236, Memorandum at 13-14.

record, were reported in the Wall Street Journal. The article disclosed many aspects of the government's continuing investigation, including Markowitz's plea agreement with the IRS, his ongoing cooperation with the government investigation, and the nexus between the investigation and the limited partnerships. Record Excerpt (R.E.) 14. The next day, the government publicly but belatedly moved to file the *ex parte* affidavit under seal.

The court continued the interim stay in a May 15 order but ruled that a blanket stay of discovery and trial proceedings would be too drastic a remedy. Instead of limiting the scope of its request, the government filed two more *ex parte* affidavits, one on May 22 and one on May 23, 1984. The District Court sealed both communications on May 24, and the U.S. Attorney later filed a motion for leave to file the *ex parte* documents. D.E. 246.

On June 6, 1984, without reference to its May 15 order, the District Court granted a stay of all discovery and pretrial briefing obligations.[3] At a later hearing to determine whether the *ex parte* affidavits should be made available to TMG II, the District Court denied TMG II's motion opposing the stay. The court revealed that the *ex parte* materials alleged that Weil was a target, not merely a subject, of the government's investigation, but refused TMG II's limited partners any access to the materials, which have not been disclosed since. The government proceeded to file additional *ex parte* materials to support a stay in No. 84-1680, which the District Court granted on August 1, 1984. D.E. (84-1680) 18-20, 25.

The stays in both actions expired by their own terms on September 14, 1984. One month later, the government applied to the District Court for entry of an order, in both

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[3] TMG II opposed entry of any stay of discovery, D.E. 232, 240, and unsuccessfully sought reconsideration of the June 6, 1984 stay. D.E. 259.

actions, rescinding its intervention *nunc pro tunc* to the date intervention was granted; the court entered an order to that effect, but only in No. 84-1680. Not only had the stays insulated the criminal investigation from civil discovery, but they also had afforded the government time to secure large tax liens against Markowitz and one of the corporate defendants (NV), shortly before settlement negotiations in the civil case began in February, 1985.

After two settlement conferences conducted by a court-appointed magistrate, appellants submitted a comprehensive settlement proposal to the defendants on April 8, 1985, with language discharging and releasing claims not only of the partnerships, but of the limited partners as well. Subsequent versions of the draft settlement agreement were exchanged among the parties on April 17 and 22, 1985.

As of the April 22 draft, the parties agreed that Markowitz and the corporate defendants would consent to a money judgment of approximately $900,000, and that Debra Strahan would be excluded from the settlement's operation. The general release language never was changed, and was retained in the final agreement as executed. On April 24, 1985, a copy of the settlement agreement, without signatures of the parties but with counsel's signatures, was forwarded to the District Court.[4]

The next day, Markowitz pled guilty to a four-count criminal information of tax fraud filed in the United States District Court for the Southern District of New York. A copy of the criminal information was included with the settlement proposal when the District Court ordered plaintiffs' counsel to transmit the proposal to the limited

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[4] During the negotiations, the partnerships demanded that the settlement document include a characterization of Markowitz's conduct as one sounding in fraud or embezzlement. D.E. 522 at 7. The actual settlement language that emerged was free of any references to fraud or embezzlement. D.E. 501; R.E. 18.

partners early in June, pursuant to a provision in the agreement that each of the limited partners be given personal notice of the proposed settlement and an opportunity to voice objections. R.E. 18 at 7-8. The comments were to aid the court, in the exercise of its discretion, to determine if the settlement should be entered, rejected, or modified.[5]

A majority of TMG II and TMG Associates partners opposed the settlement offer, airing their views in written comments to the court, at a hearing before the magistrate, and in final memoranda. The magistrate, citing these objections by the partners and the untimely guilty plea by Markowitz, recommended rejection of the settlement agreement.[6]

The District Court rejected the magistrate's report and entered the settlement, substantially as proposed, precluding the partnerships, as entities, from suing with respect to the fraud to which Markowitz had admitted guilt. The court made two modifications pertinent to this appeal. First, the court responded to the limited partners' objections by removing the individual limited partners from the settlement, thereby permitting them to sue in their individual capacity;[7] second, the court inserted Strahan as a party to the settlement, effectively dismissing her as a party to the lawsuit, essentially because of her limited resources.

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[5] This discretion derives in part from paragraph six of the agreement, which provides that, after receipt and consideration of the limited partners' comments, "the Court may, in its discretion modify this order upon a showing of good cause by one or more commentors." D.E. 501; D.E. 510.

[6] The magistrate did not find that Markowitz or his counsel had acted in "bad faith" by not disclosing the plea during the settlement discussions. D.E. 522 at 8.

[7] The court concluded that the individual partners were not, and had not been, parties to these suits. D.E. 540; R.E. 10 at 2.

II.

A. The Rule 11 Issue

In opposing Markowitz's third motion for a stay, TMG II alleged that the motion violated Rule 11 and entitled TMG II to sanctions, specifically attorney's fees. Appellants assert that the District Court's order of April 4, 1984, stating that "it appear[ed] that the motion was filed in violation of Rule 11,"[8] compelled imposition of sanctions. Appellees, while perhaps conceding the violation,[9] counter that appellants waived their right to sanctions. Both parties claim that their position has been buttressed by subsequent events: appellants claim that the violation has been revealed as more serious than appeared at the time, Br. of Appellant at 39-41; appellees claim that the government's successful motion for a stay precludes a finding that its own motion for such relief was impermissible under Rule 11. Br. of Appellee at 55-58.

The District Court did not act on the initial sanctions request, and the wording of the order makes it unclear whether the court found a Rule 11 violation. The court does not mention what sort of abuse it identified in the motion, denying us a basis on which to review the order. More importantly, the court's use of the word "appearing" is ambiguous, compelling a remand to determine if the

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[8] The specific language of the order reads:

> Upon consideration of defendant Markowitz's third motion for a stay of all proceedings as to him and the opposition thereto, and it appearing that the motion was filed in violation of Rule 11, Federal Rules of Civil Procedure, it is this 3d day of April, 1984, hereby ORDERED: that defendant's motion is DENIED.

D.E. 187.

[9] Appellees' counsel appear to concede that the District Court *had* found a Rule 11 violation. *See* Br. of Appellees at 14 ("Given the Court's previous finding that Mr. Markowitz had violated Rule 11 . . . "). We cannot accept their characterization as determinative without a clearer ruling from the District Court.

court did in fact find a violation. Therefore, we remand to the District Court for further explanation and clarification as to whether the April 4 order found a Rule 11 violation.

If, on remand, the District Court concludes that it did find a violation, it must impose appropriate sanctions. Rule 11's wording, that the court "shall impose" sanctions for violations, eliminates the court's discretion to forego

sanctions once it has found a violation of the rule.[10] *See, e.g., Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174, 1179-80 (D.C.Cir.1985); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 n. 7 (2d Cir.1985). The current obligation to impose sanctions under Rule 11 contrasts, as we have noted before, with the more permissive approach to sanctions that obtained prior to 1983 amendments to the rule. *See Westmoreland*, 770 F.2d at 1174 n. 8; *see also Eastway Construction Corp.*, 762 F.2d at 254 n. 7.

Despite the plain requirements of the rule, appellees claim that TMG II "waived" its right to sanctions by not renewing its motion for attorney's fees when it had an opportunity to do so. Br. of Appellees at 56-57. We are not aware, however, of any duty requiring that once such a motion is made, it must be renewed to prevent waiver. Nor did the settlement agreement effect such a waiver: assuming (without deciding) that a party has the power to "waive" sanctions, such a provision would have to be more explicit than any presented in the settlement agree-

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[10] Rule 11, in pertinent part, provides as follows:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

ment. *Cf. Chapman & Cole v. Itel Container Int'l B.V.*, 116 F.R.D. 550, 552 (S.D.Tex. 1987) (settlement agreement no bar to Rule 11 sanctions).

The District Court does, however, retain discretion to tailor Rule 11 sanctions as appropriate to the facts of a particular case. Rule 11 (Notes of Advisory Committee to 1983 Amendment); *Eastway Construction Corp.*, 762 F.2d at 254 n. 7. We leave the District Court, if it should decide that there was a violation, free to decide the appropriate sanction on remand, noting particularly that an award of attorney's fees might well be considered inappropriate in light of the entry of the settlement agreement purporting to settle all claims.

B. The Settlement Agreement

Appellants urge several challenges to the District Court's entry of the settlement order. At the outset, however, we must stress the limited scope of our review of such orders. Appellants must show that the District Court abused its discretion: this generally requires a showing either that the agreement in question was so manifestly unfair as to preclude judicial approval, or that the court did not have sufficient facts before it to make an informed judgment.[11] The appellants here raise essentially three objections to the settlement order, all sounding in the fairness of, rather than the factual basis for, the settlement agreement.

The first of these raises the timing of Markowitz's guilty plea, and the appellants' failure to disclose the plea agreement during settlement negotiations. This was a concern noted by the magistrate, who apparently accepted

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[11] *See, e.g.; Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir.1976) (requirement in judging appropriateness of settlement is whether trial court had sufficient facts before it to make informed judgment); *Glicken v. Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y.1964) (question raised as to whether settlement, taken as a whole, was so facially unfair as to preclude judicial approval).

appellants' argument to this Court that the partnerships were unfairly surprised by the announcement of the guilty plea, and that they would not have signed had they known about it earlier.

There was ample reason for the District Court to reject this contention as baseless. All parties knew as early as May 4, 1984, when the government sought to intervene in order to seek a stay, that Markowitz, Weil, and TMG II were all subjects of a tax fraud investigation. Six days later, Markowitz's plea agreement with the government was trumpeted in the front page Wall Street Journal article, and counsel for the partnerships admitted to the District Court that he had seen the article. Unnumbered D.E. between 525 and 526 at 67. The article generated a series of articles in other national newspapers and magazines that left no ambiguity as to the substance of the guilty plea or the involvement of the partnerships.[12]

Under these circumstances, it was within the District Court's discretion to consider the claim of unfair surprise implausible. The partnerships were free, upon the government's intervention and the attendant publicity, to make Markowitz's plea a subject of settlement bargaining. But at no time during the settlement discussions did the partnerships request, as a condition of settlement, any representation from Markowitz with respect to the criminal investigation. Nor did the partnerships request or secure from Markowitz an indemnification for individual tax losses that they might incur by virtue of any plea agreement.

Appellants contend next that the rejection of the proposed agreement by the limited partners is a basis for

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[12] The specific details of the fraudulent scheme were discussed in elaborate detail in a Washington Post article dated May 21, 1984. The author summarized the IRS allegations that the alleged transactions managed by Markowitz never took place. *See* D.E. 517, Ex. E.

Articles appeared also in The New York Times, Barrons, Business Week, and other publications. D.E. 517, Exs. B-G.

finding error in the District Court's approval of the settlement. *See* Br. of Appellants at 34. This, too, was one of the reasons the magistrate recommended against entry of the settlement order. Since the magistrate's report, however, the District Court has answered this contention by striking from the settlement order the provision releasing Markowitz and the corporations from the limited partners' individual claims. *See* D.E. 539, August 30, 1985 Memorandum at 5. Individual partners, as distinct from the partnerships as entities, can still bring suit against Markowitz and the corporations for fraud or for disappointed tax expectation. By excluding the limited partners from the operation of the agreement, the District Court already has given effect to the partners' vote.

The individual release provision was of considerable value to Markowitz and formed a material part of the consideration in exchange for which he had agreed to suffer a monetary judgment. When the District Court struck this provision, it did not reduce the amount of the judgment against Markowitz and the corporations, thereby giving the partnerships a considerable advantage for which they had not bargained. This belies any claim of unfairness to the appellants.

Finally, appellants contend that the settlement order deprived the limited partners of a full final accounting of partnership affairs from Markowitz. Br. of Appellants at 47-52. Appellants correctly contend that they had a right to an equity accounting of partnership affairs, and that such an accounting would be a condition precedent to any other form of relief between partnership members.[13] Appellees do not challenge the principle that a general

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[13] Both possible sources of applicable law are in agreement on these points. *See* New York Partnership Law §§ 42-44 (McKinney 1948 & Supp.1987); D.C.Code §§ 41-119-21 (1981). *See generally Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir.1977); *Friedman v. Golden Arrow Films, Inc.*, 442 F.2d 1099 (2d Cir.1971).

partner has a fiduciary duty to render an accounting, but rather they assert that if the partnerships had wanted a more precise accounting than that which they sought and obtained in the settlement, they need not have negotiated the settlement agreement, and could have taken the case to trial. *See* Br. of Appellees at 49-50.

Oddly, appellants concede this point, noting authority for the proposition that a partnership accounting may be the subject of negotiation. *See* Reply Br. of Appellants at 16. The real issue, they contend, is the *conduct* of those negotiations, because the partnerships would not have accepted settlement without representations by Markowitz's counsel that there was no fraud on the record. *Id.* at 16-17. This argument, though, simply rehearses the claims of unfair surprise we considered and rejected earlier.

For the reasons stated, the District Court was well within its discretion to conclude, in spite of these claims, that appellants knew with whom they were dealing. We therefore affirm the District Court's entry of the settlement order, excepting those particular aspects of the order we consider below.

C. Dismissal of Defendant Strahan

The District Court dismissed Strahan as a defendant by inserting her as a party to the settlement agreement, despite her refusal to sign the agreement, and despite agreement among the settling parties that she would be excluded from its operation. D.E. 507. Relying on its modification authority, the court based its dismissal on Strahan's asserted inability to pay any judgment against her.[14]

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[14] The District Court determined

> that prosecution of the few and relatively minor claims against this defendant, who has testified without contradiction as to her limited finances, would be wasteful of judicial resources and involves the expenditure of patently inordinate time, money and

In this modification of the settlement order we conclude that the District Court abused its discretion. Initially, we note that the factual basis for this modification is wanting: the record does not reflect that Strahan is without resources to satisfy a judgment. In collateral proceedings below in C.A. 83-3685,[15] it has been reported that Strahan owns a substantial interest in District of Columbia realty, worth approximately $575,000. *See* D.E. 567.

Had the record on this issue been adequate, moreover, Strahan's limited resources still would not be a basis for dismissal. The decision as to whether the likely return on a particular claim is worth the expense of litigation is one typically left to the parties. Even if the court could reasonably conclude that Strahan cannot currently pay a judgment, appellants have the right to seek a judgment in the expectation that Strahan's financial position will improve. Judgments in the District of Columbia have a potential life of 24 years. *See* D.C.Code § 15-103 (1981). Appellants also should have the right to pursue their claims to equitable relief against Strahan, which would be unaffected by her supposed penury.

The appellants did not forfeit these rights by conferring some limited modification authority on the District Court. The settlement agreement allowed the court discretion to modify the agreement only on the basis of comments or

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effort by the limited partnership plaintiff (TMG II) in Civil Action No. 83-3685 and by defendant.

D.E. 507.

The dismissal of Strahan was relief added at the specific request of her counsel. At the August 14 hearing, the court delegated to her attorney the task of formulating new final order language. *See* unnumbered D.E.'s of the same date. In addition to submitting the language, Strahan's counsel added the provision dismissing his client. D.E. 553. No hearing was held on that provision.

[15] We are free to take judicial notice of this related proceeding in another court. *See Dupree v. Jefferson*, 666 F.2d 606 n. 1 (D.C.Cir.1981).

objections tendered by the limited partners during the voting process. D.E. 501 at 8. No limited partner, either in written comments or in testimony during the hearing on the agreement, expressed the view that Strahan should be dismissed.

Because we conclude that the court overstepped its modification authority, we vacate and remand to the District Court its dismissal of Strahan. The partnerships should be free to proceed against Strahan with any claims, equitable or legal, that they might have.

D. The Stay Issue and *Nunc Pro Tunc* Entrance of the Settlement

Appellants finally assert that the District Court erred in granting the government's motion to stay proceedings; they object particularly to the court's apparent reliance on *ex parte* materials in issuing the stay. They ask us to rule that the government's extensive participation in No. 83-3685, premised as it was on *ex parte* materials, was improper.

Appellants contend that the *ex parte* materials and the stays had significant and deleterious effects, because they resulted in a one year delay of trial that permitted the IRS to file tax liens against Markowitz, NV, and Strahan before appellants could secure a final decree and enforce a judgment lien against them. A five day trial in No. 83-3685 was scheduled to begin October 22, 1984, and there probably would have been a final decree prior to the filing of the tax liens had the stays not issued.[16] Appellants therefore request that relief in TMG II's favor be entered

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[16] *See* Br. of Appellants at 19, 66-67. Although a properly perfected federal tax lien takes priority over most other liens, a perfected judgment lien takes priority over a later-filed tax lien. IRC § 6321, 26 U.S.C. § 6321 (1982). Appellants contend the government's tax liens in this case attached prior to the District Court's judgment and decree only because of the stay. *See* Br. of Appellants at 67.

nunc pro tunc to October 26, 1984, the scheduled concluding date for the trial on the merits of C.A. 83-3685.

This Court does not pass upon appellants' suggestion that entry of a stay of discovery, following *ex parte* communications by the government, was reversible error.[17] Regardless of the propriety or impropriety of the stays, the core issue here is whether justice requires entrance of the settlement *nunc pro tunc*, since this is the only remedy that would redress any injustice appellants claim to have suffered. A judgment entered *nunc pro tunc* is one given effect as of a date in the past.[18] The principle underlying entry of a judgment or an order *nunc pro tunc* is that of

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[17] We agree with appellants' assertion that the entry of stays and the conduct of most judicial actions *ex parte* are generally disfavored in American jurisprudence. *See Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C.Cir.1986) (discussing *in camera review of ex parte* government affidavits), *cert. granted*, ___ U.S. ___, 107 S.Ct. 666, 93 L.Ed.2d 718 (1986); *Military Audit Project v. Bush*, 418 F.Supp. 876, 878 (D.D.C.1976).

A total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy appropriate for extraordinary circumstances. *See Gordon v. FDIC*, 427 F.2d 578 (D.C.Cir.1970); *SEC v. Dresser Industries*, 628 F.2d 1368, 1376 (D.C.Cir.), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). Indeed, appellees concede as much. *See* Br. of Appellees at 53. The situation at hand is even more unusual because the government attempted and succeeded in staying the discovery of information by private parties. The strength of the case law does not, however, change our belief that this Court need not attempt to unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to the appellants is *nunc pro tunc* entry of the settlement order.

[18] Translated literally from the Latin, the phrase means "now for then." 6A MOORE'S FEDERAL PRACTICE, ¶ 58.08 at 58-75 (1985 ed.). In reference to the rendition of a judgment, "*nunc pro tunc* signifies that there is to be a relation back to a designated past date and that the judgment and/or entry are to be given certain anterior effects." *Id.*

fairness to the parties, seeking to rectify any injustice suffered by them on account of judicial delay.[19]

There are several reasons why such relief might be appropriate in this case. First, we note that the government sought, and was granted, an order rescinding its intervention *nunc pro tunc* to the date it first intervened. If the government can move the calendar back one year there is no reason why the appellants should not have an opportunity for similar relief. Second, the government's intervention was intended to protect a criminal investigation; it is unclear why the District Court's acquiescence for this narrow purpose should confer an advantage to the government in enforcing its civil tax lien.

This latter consideration makes clear, however, why we must have the District Court determine whether the entry of judgment *nunc pro tunc* for TMG II is appropriate. The government, which stands to lose its tax lien priority if judgment is entered *nunc pro tunc*, is the real party in interest as to this issue. But the government is not a party to this appeal and therefore cannot defend its interests. Accordingly, we remand so that the District Court may request from the government any evidence, argument, or briefing that it believes is necessary.

As the Supreme Court has stated, a "*nunc pro tunc* order should be granted or refused, as justice may require, in view of the circumstances of the particular case." *Mitchell v. Overman*, 103 U.S. (13 Otto) 62, 65, 26 L.Ed. 369 (1881). Entry *nunc pro tunc* thus must have a proper fac-

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[19] *See, e.g., Mitchell v. Overman*, 103 U.S. (13 Otto) 62, 64-65, 26 L.Ed. 369 (1881) (where delay has been caused either for a court's convenience, or by intricacy of the questions involved, or by any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively: "[i]n such cases . . . it is the duty of the court to see that the parties shall not suffer by the delay").

tual basis.[20] Our inability to appraise this factual basis on appeal, without the participation of the real party in interest, compels our restraint. This issue is best left to the discretion of the District Court on remand.[21]

III.

For the foregoing reasons, we affirm the District Court's modification and approval of the settlement agreement, with the exception of the dismissal of Strahan as a defendant. As to this latter issue, we vacate and remand. We also remand to the District Court the issue of whether the settlement order should be entered *nunc pro tunc*. Finally, we remand to the District Court its April 1984 Order, which suggested that a Rule 11 violation had occurred, for further clarification and for the imposition of an appropriate sanction if Rule 11 was violated.

It is so ordered.

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[20] *See also Moore's Federal Practice*, *supra* note 18, at 58-77 (citing authorities).

[21] Appellants contend that the government has declined to participate in this appeal. *See* Supplemental Br. of Appellants at 5. The District Court is better situated to assess both the government's reasons for nonparticipation and the actual need for its participation.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Nos. 83-3685-LFO, 84-1680-LFO and 85-2469-LFO.

Original Transcript April 26, 1988

* * *

[67] On the lien, I find that the plaintiff has failed to prove by a preponderance of the evidence or a preponderance of the argument or a preponderance of the hypotheses, if I can put it that way, that there is a causal connection between the four-month stay and the priority which the Government now has for its lien.

I heard no dissent from the plaintiff to the government's representation that if the case had been settled in October, as the plaintiff hypothesized, and there had been a controversy about it thereafter, as the government hypothesized, that the judgment would not have been enterable, that the judgment on the settlement would not have been enterable, until after the government lien had attached.

[68] I am further persuaded by the arguments of both parties—and, as Mr. Szymkowicz says, that the imminence of a trial date concentrates the mind—that the imminence of the trial date and/or the entry of settlement would have concentrated the government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered.

If the plaintiffs will submit a proposed motion and order as I suggested, I will enter that; and if the plaintiffs want

to include in the proposed order a provision denying the motion to enter judgment for the plaintiffs *nunc pro tunc*, let the government see that and file it as having been seen by the government.

I think Mr. Doyle should have an opportunity to respond. He should be served in a formal way and have the opportunity to respond to the motion for the award of fees and costs. Thank you, gentlemen, that is all.

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1956

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD WEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly denied petitioner's application for entry of judgment *nunc pro tunc*.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 898 F.2d 198. The order of the district court (Pet. App. 10a-11a) is unreported. A related opinion of the court of appeals (Pet. App. 12a-31a) is reported at 829 F.2d 166.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1990. The petition for a writ of certiorari was filed on June 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the early 1980s, Edward Markowitz was the managing general partner of TMG II, a limited partnership. Markowitz was also the president and sole shareholder of Monetary Groups, Ltd. (MGL), a corporation that served as general partner for another limited partnership, TMG Associates. Under Markowitz's direction, TMG II and TMG Associates created marketable tax losses through sham transactions. As a result, the Internal Revenue Service launched a criminal investigation of Markowitz. Petitioner, a general partner of TMG II, cooperated with the government in this investigation. In November 1983, as a result of the investigation, Markowitz and MGL resigned as general partners. Pet. App. 13a-15a.

In December 1983, petitioner, on behalf of TMG II, filed an action in the United States District Court for the District of Columbia against Markowitz, his associate Debra Strahan, MGL, and other corporations controlled by Markowitz. Petitioner alleged that the defendants "had diverted partnership property and business to themselves in violation of state and federal law." Pet. App. 13a. The complaint sought equitable and monetary relief. Between December 1983 and March 1984, as a result of the pending criminal investigation, Markowitz filed three separate motions in the district court to stay the civil action. The district court denied each motion and scheduled trial for October 1984. *Id.* at 7a, 16a.

In May 1984, the United States Attorney for the Southern District of New York filed a motion on behalf of the government to intervene in the pending civil action for the limited purpose of staying discovery. The United States Attorney asserted that "[pe-

titioner] and his counsel were intentionally misusing discovery to get an illicit preview of the [criminal] investigation, and disclosed that all of the parties to the civil suit were subjects of that same investigation." Pet. App. 17a. The government supported its motion with an affidavit of an Assistant United States Attorney served on opposing counsel and a second affidavit, filed *ex parte* without notice to opposing counsel. The district court temporarily stayed further discovery on May 7, 1984. *Ibid.*[1]

On May 15, after a hearing, during which counsel for TMG II presented its objections, the district court continued the stay of discovery. On May 22 and 23, the government filed two additional *ex parte* affidavits, which the district court placed under seal.[2] In June, the court entered an order continuing the stay of discovery until September 1984. Pet. App. 18a.[3]

In January 1985, several months after the stay had expired, the Internal Revenue Service made an assessment against Markowitz in the amount of $5,409,950.73 for unpaid income taxes and filed a

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[1] Several days later, the Wall Street Journal reported the contents of the *ex parte* affidavit, which had been mistakenly put in the public record. On the government's motion, the court promptly placed that affidavit under seal. Pet. App. 17a-18a.

[2] Petitioner asserts that "the Government now knows—that much of the contents of its *ex parte* communications to the Court was patently false." Pet. 17. The record contains no support for this claim, and petitioner cites none.

[3] The government did not seek any further extensions of the stay. Nor did the government participate in the pending civil actions against Markowitz and his co-defendants. Pet. App. 18a-19a.

notice of federal tax lien with the District of Columbia Recorder of Deeds. Pet. App. 8a, 19a.[4]

In April 1985, the parties reached a tentative settlement of the pending civil action. Under that agreement, Markowitz and the corporate defendants agreed to a money judgment of approximately $900,000; each of the limited partners would be personally notified of the proposed settlement and given an opportunity to object. Pet. App. 19a-20a.

On April 25, Markowitz pleaded guilty to criminal tax fraud charges filed in the Southern District of New York. A copy of that criminal information, together with the tentative settlement of the civil action, was sent to each of the limited partners. A majority of those partners opposed the settlement. Nonetheless, the district court later entered judgment approving the settlement on August 30, 1985. Pet. App. 8a, 19a-20a.

2. Petitioner challenged that judgment on appeal, contending, among other things, that the district court erred in granting the government's motions for a stay based on *ex parte* submissions. In particular, petitioner claimed that the "stays * * * resulted in a one year delay of trial that permitted the IRS to file tax liens against Markowitz [and others] before [petitioner] could secure a final decree and enforce a judgment lien against them." Pet. App. 28a. Petitioner therefore requested that "relief in TMG II's favor be entered *nunc pro tunc* to October 26, 1984, the scheduled concluding date for the trial on the merits * * *." *Id.* at 28a-29a.

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[4] The IRS later took similar action with respect to the corporations Markowitz owned and controlled. Pet. App. 8a, 19a.

The court of appeals substantially affirmed the district court's judgment. Pet. App. 12a-31a. In so ruling, the court also determined that it "need not attempt to unravel the complex web of facts concerning the propriety of the stays and *ex parte* communications when the only real relief available to [petitioner] is *nunc pro tunc* entry of the settlement order." *Id.* at 29a n.17. Since the government was "not a party to this appeal and therefore [could not] defend its interests," the court concluded, it needed to remand the case to the district court for a determination of "whether the entry of judgment *nunc pro tunc* for TMG II is appropriate." *Id.* at 30a.

3. On remand, the district court denied petitioner's application for entry of judgment *nunc pro tunc*. Pet. App. 32a-33a; see *id.* at 10a-11a. The court found that petitioner had failed to show that there was "a causal connection between the four-month stay [obtained by the government] and the priority which the Government now has for its lien." *Id.* at 32a. In addition, the court determined that the government's lien priority was inevitable. As the court explained, "the imminence of the [scheduled October 1984] trial date and or the entry of settlement would have concentrated the government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered."

4. The court of appeals affirmed. Pet. App. 1a-9a. It recognized that "[*n*]*unc pro tunc* relief has been granted only in a limited number of circumstances, where its entry is necessary to avoid, and does not create, an injustice at the hands of the court itself." *Id.* at 5a.[5] Here, the record showed that petitioner

[5] The court of appeals pointed out that "justice here requires, at most, only that [petitioner] neither be hurt nor

> proffered insufficient reasons to believe that if the original trial schedule had been followed, the problems and delays that actually arose once the stay expired and the litigation was resumed would not still have arisen and thus caused the judgment in his favor to be entered after the Government's lien had attached.

Id. at 7a. As the court explained, this was a "persuasive" reason for denying petitioner's requested relief:

> The overwhelming fact is that the stay was in force only from May 7 until September 14, just over four months, whereas the district court entered the settlement on August 30, 1985, almost one full year after the stay had expired (and more than seven months after the Government filed its tax lien). We do not think it the more likely that, but for the stay, entry of a settlement would have come between May and October when in fact, once the clock started to run again with the expiration of the stay, it took the parties a year to accomplish that result.

Id. at 8a-9a.

Moreover, the court of appeals pointed to a "second conclusive" reason for rejecting petitioner's claim. Pet. App. 7a. The record showed that the government was closely monitoring developments in the pending civil action and thus could have filed its

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helped by the stay." Pet. App. 6a. For that reason, the court concluded that "such matters as TMG II's assistance to the Government during its investigation and the Government's alleged misconduct in obtaining the stay upon the basis of an *ex parte* submission to the court * * * [were irrelevant] to the question whether the stay enabled the Government to gain temporal priority for its tax lien." *Ibid.*

tax lien as soon as it learned of a proposed settlement, a point in time which would have assured the government's lien priority. *Id* at 9a. The court thus concluded that petitioner "has failed to demonstrate that, but for the stay, TMG II's claim against Markowitz would have had priority over that of the Government." *Ibid.* In these circumstances, the court held, "[t]he interests of justice would not be served * * * by entry of [petitioner's] judgment *nunc pro tunc.*" *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 20-23) that the courts below erred in refusing to enter judgment *nunc pro tunc* in order to defeat the government's lien priority. As leading commentators have explained:

> Cases involving an entry of judgment nunc pro tunc generally break down into two groups: (1) those in which one of the parties died after the submission of the case to the lower court for decision, but before the actual rendition of judgment; and (2) those in which a previous judgment has in fact been rendered by the lower court, but the clerk has failed to perform the ministerial function of entry.

6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 58.08, at 58-76 (2d ed. 1989); see *Cuebas Y Arredondo* v. *Cuebas Y Arredondo*, 223 U.S. 376, 390 (1912); *Mitchell* v. *Overman*, 103 U.S. 62, 64-65 (1881). Under these governing standards, petitioner plainly was not entitled to an entry of judgment *nunc pro tunc*. See, *e.g.*, *Cyrpress Barn, Inc.* v. *Western Electric Co.*, 812 F.2d 1363, 1364 (11th Cir. 1987).

To be sure, federal courts have carved out a narrow exception to these standards in order to reach

an equitable result in bankruptcy cases, but only in "extraordinary circumstances where [entry judgment *nunc pro tunc*] will not prejudice any party or frustrate the purposes of the Bankruptcy Code." *In re Auto-Train Corp.*, 810 F.2d 270, 275 (D.C. Cir. 1987); see *In re Triangle Chemicals, Inc.*, 697 F.2d 1280, 1282 (5th Cir. 1983). Petitioner may not find a safe harbor in that narrow exception where, as here, entry of judgment *nunc pro tunc* would prejudice third parties. See 6A J. Moore & J. Lucas, *supra*, ¶ 58.08, at 58-78.

Moreover, the record confirms that petitioner failed to establish any entitlement to the extraordinary relief sought. The district court did not enter judgment until approximately one year after the stay expired. And the delay in entering that judgment was scarcely attributable to the four-month stay obtained by the government. To the contrary, settlement discussions lasted at least two months and the limited partners' rejection of the settlement caused a further four-month delay. Moreover, given the government's monitoring of the civil action, "the imminence of * * * the entry of settlement would have concentrated the government's mind to where it would have effected its assessment and accompanying lien before the judgment was entered." Pet. App. 32a. Accordingly, as the court of appeals correctly determined, since "TMG II's claim would not have had priority over that of the Government absent a stay, there is no reason why it should have priority merely because the Government obtained a stay." *Id.* at 6a.

2. Petitioner also contends that the government's "communications made below to the District Court—from a nonparty and without prior notice to opposing

counsel—are beyond the pale of any authorized exception to the bar on *ex parte* contracts." Pet. 17; see Pet. 14-20. This case, however, does not present an occasion to address that issue. The court of appeals expressly declined to consider that contention, recognizing that it was not "relevant to the question whether the stay enabled the Government to gain temporal priority for its tax lien." Pet. App. 6a. Petitioner offers no persuasive reason for this Court to consider that question in the first instance.

In any event, petitioner's claim is groundless. Here, the government submitted affidavits *ex parte* in order to avoid compromising an ongoing criminal investigation. Federal courts have long sanctioned such a procedure. See, *e.g.*, *In re Special September 1978 Grand Jury*, 640 F.2d 49, 56-57 (7th Cir. 1980); *United States* v. *Cortese*, 614 F.2d 914, 921-922 (3d Cir. 1980); see also *United States* v. *Nixon*, 418 U.S. 683 (1974).[6] Moreover, the record shows that the government's submission did not prejudice petitioner. See, *e.g.*, *Aiken County* v. *BSP Division of Envirotech Corp.*, 866 F.2d 661, 677-678 (4th Cir. 1989); *Simer* v. *Rios*, 661 F.2d 655, 679 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982). Petitioner received a less detailed version of the first *ex parte* submission and had access to those parts of the submission made public by the Wall Street Journal. See note 1, *supra*. And petitioner, represented by counsel, appeared at the hearing on the government's

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[6] Petitioner's citations (Pet. 18-20) to *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509 (D.C. Cir. 1988), and *Texas* v. *New Mexico*, 485 U.S. 388 (1988), are beside the point. The latter case did not involve any issue regarding *ex parte* communications; the former case, as petitioner concedes, "did not * * * reach the *ex parte* contacts issue." Pet. 18.

motion for stay. On this record, the court of appeals thus correctly characterized petitioner's assertion of prejudice as "a broadside that lacks any factual support." Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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